No. 21,166

IN THE

United States Court of Appeals

For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA, a corporation,
Plaintiff and Appellant,

vs.

ROBERT T. GREENE, et al.,
Defendants and Appellees.

Appeal from the Judgment of the United States District Court for the Northern District of California (Southern Division) Honorable Lloyd Burke, Judge

APPELLANT'S REPLY BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Northern District of California entered on June 30, 1966 (Clerk's Transcript, p. 35) which denied appellant's relief on their complaint filed for declaratory relief (Clerk's Transcript, p. 35) which denied Appellant's relief on their defendants Isensee are citizens of the State of Oregon.

Appellees Greene are citizens of the State of California and Appellant is a corporation incorporated under the Laws of the State of Pennsylvania. (Clerk's Transcript, p. 1.) Defendants Isensee have filed an action for damages in excess of $10,000 in the Superior Court of California in and for the County of San Mateo against appellees Greene. Original jurisdiction of the Federal District Court for the Northern District of California attached by virtue of 28 U.S.C. 1332. That Court was empowered to entertain and decide the declaratory relief action brought by Appellant under 28 U.S.C. 2201. (Clerk's Transcript, p. 2.) All such decisions have the "force and effect of a final judgment or decree and are reviewable as such." The aforesaid judgment is appealed to this Court under 28 U.S.C. 1291.

STATEMENT OF CASE

This is an appeal from the judgment of the United States District Court for the Northern District of California (Southern Division), the Honorable Lloyd Burke, Judge, Presiding, in an action for declaratory relief filed by the Appellant on June 18, 1964. Appellant seeks declaratory relief from affording insurance coverage under its Homeowner's Policy "B" No. H 15-79-08, issued to defendants Robert T. Greene and Helen K. Greene, July 3, 1962. (Plaintiff's Exhibits Nos. 3, 4; RT pp. 2, 3.)

The policy contains the following exclusion (Plaintiff's Exhibit No. 5):

"This Section does not apply:

* * * * * * *

b. Under Coverages E and F, to the ownership, maintenance, operation, use, loading and unloading of (1) automobiles or midget automobiles while away from the premises or the ways immediately adjoining . . ."

On or about July 14, 1962, defendant Robert T. Greene, the son of defendants Stanley R. Greene, and Helen K. Greene was operating a gasoline motor driven "go-cart". He was involved in an accident with the person of defendant Charlotte Isensee whereby the latter allegedly sustained bodily injury. The place where the accident occurred was at a point fifty feet beyond or generally north of the rear property line of the Greenes' property, and on an easement adjacent to the Newmayer property. (Plaintiff's Exhibit No. 1; RT p. 5.) This easement, called the Hickey easement, belonged to the Newmayers and constituted a private driveway to the Newmayer property. (Plaintiff's Exhibit No. 1.)

This easement was parallel to the Greenes' driveway. It was separated from the Greenes' driveway by a redwood fence which extended from Olive Hill Lane in a generally northerly direction to the back property line of the Greenes' premises. The Hickey easement continued beyond the rear property line of Greenes' property where it adjoined the Newmayer property and not that of Greene. A wire fence extended from the northerly end of the wooden fence referred to above. This wire fence continued north-

erly with the Newmayer property to the east of it and the Hickey easement to the west of it. These fences are illustrated in Plaintiff's Exhibits Nos. 1, 2A, 2B and 2C. There was no break in either fence to allow a vehicle to pass from the defendants Greenes' driveway to the easement constituting the Newmayer driveway. (RT pp. 40-41.)

ISSUES

1. Whether the accident occurred at a point on "a way immediately adjoining" the appellee Greene's property and thereby covered by Policy No. H 15-79-08 issued by Appellant.

2. In view of appellee's brief, page 7, an issue is whether the issue of estoppel is before this Court and, if so, whether the burden of proof was met in the trial in the District Court.

SPECIFICATIONS OF ERROR

1. The District Court erred in finding and concluding that the accident occurred on "the ways immediately adjoining" the defendants Greenes' premises. (Clerk's Transcript, pp. 25-36; RT pp. 43-44.) The record clearly establishes (it was so stipulated) that the accident in question occurred fifty feet north of the most northerly property line of defendants Greenes' premises and on an easement known as the Hickey

easement which constitutes the private drive of the Newmayer property. (Plaintiff's Exhibits Nos. 1, 2A, 2B, 2C; RT pp. 1, 41-43.)

2. The District Court erred in finding and concluding that the Appellant afforded coverage to defendants Greene under the terms of its Policy No. H 15-79-08, and that the exclusions therein did not apply. (Clerk's Transcript, pp. 25-26; RT p. 44.) The said policy clearly states that no coverage for personal liability is provided while an automobile or midget automobile was being operated "while away from the premises or the ways immediately adjoining". (Plaintiff's Exhibits Nos. 3, 4 and 5.)

ARGUMENT

I

THE TERM "WAYS IMMEDIATELY ADJOINING" HAS A CLEAR, UNEQUIVOCAL AND DISTINCT MEANING.

Appellee's brief asserts that the terminology used in the Appellant's exclusion clause is ambiguous and uncertain (Appellee's Brief, p. 4) and that case authority in support of Appellant's position is not convincing (Appellee's Brief, p. 6).

Appellee has scrupulously avoided discussion of *United States v. Great American Indemnity Company,* 214 F. 2d 17 (9th Cir. 1954) cited in Appellant's opening brief at page 6. In that case, this Court dealt with the same phraseology and determined it to be neither

ambiguous, nor uncertain. The Court applied the clearly restrictive meaning of the phrase. 214 F. 2d at p. 19.

In *Pacific Employers Insurance Company v. Maryland Casualty Company, American Mutual Insurance Company,* 65 A.C. 339 (Appellee's Brief, p. 5), the California Supreme Court was concerned with the application of the principles announced by it in *Wildman v. Government Employees' Ins. Co.,* 48 Cal. 2d 31, 307 P. 2d 359, to the American Mutual policy. The *Wildman* case announced that it was public policy of the State, to require insurers to afford coverage in all situations when the vehicle is being driven with the permission and consent of the insured. Thus, it is generally agreed that as public policy, the provisions of California Vehicle Code § 16451 are incorporated into every policy of insurance.

In the *Pacific Employers* case, supra, American Mutual insured the owners and lessors of forklifts. An accident occurred when a forklift was being operated by an employee of the lessee of the lift. The accident occurred on the premises of the lessee. It was argued that American Mutual policy owed primary coverage as the forklift was being operated by a permissive user. American Mutual denied that it owed primary coverage on the grounds that the forklift was not being operated by a person covered by its policy and on a clause excluding application if the "accident occurs away from such premises or the ways immediately adjoining." The issue to be decided was whether American Mutual owed primary coverage of

the operations of an "independent contractor" (the forklift operator). The Court stated at 65 A.C. 344:

> "Thus, the liability for the operations of independent contractors . . . would depend on whether the forklifts were 'automobiles' ".

The Court found that a forklift was an "automobile" and thus the American Mutual policy was susceptible to the public policy announced in the *Wildman* case.

The Court also considered an argument by American Mutual that the *Wildman* doctrine did not apply because the policy in question was not an automobile policy. The Court responded that the label of the policy was insignificant. The Court determined that under the language of the exclusion clause "ways immediately adjoining" could include public ways. If a policy purports to provide coverage of use of a vehicle on a public highway, then it was susceptible to the public policy of the State requiring coverage for all permissive users. This seems to be the law of the *Pacific Employers* case, and nothing more. The Court's discussion of the language of the exclusion clause as cited in Appellee's brief, page 5, is to show that the policy covers use of a vehicle on a public highway. This is dicta and not necessary to the holding of the case.

The net result was that due to the anxiety of the California Supreme Court to apply the public policy of California to the case, an insurer of the lessor's premises was required to afford coverage for an accident which did not occur on those premises, on ways immediately adjoining, on a public highway, but on

the premises of the lessee, which were totally removed from those insured and clearly outside of the contemplation of the parties to the contract of insurance.

It is submitted that there is no need to rewrite the policy in the case at bar, as the clear language of the exclusion clause should be given effect.

II

ESTOPPEL IS NOT APPLICABLE TO THE CASE AT BAR.

In Appellee's brief, page 7, it is urged that Appellant is estopped from denying coverage to the insured.

A. The question of estoppel cannot be raised for the first time on appeal.

Estoppel was not set forth in Appellee's answer to the Complaint for declaratory relief. (Clerk's Transcript, p. 4.)

Fed. R. Civ. P. 8(c) specifically provides that estoppel must be affirmatively set forth as a defense in pleading to a preceding pleading.

Fed. R. Civ. P. 12(h) provides that a party waives all defenses and objections which he does not present either by motion or in his answer or reply. No motion was made by Appellee asserting the defense of estoppel prior to trial.

The issues upon which the trial is to be held are ultimately determined by the pre-trial conference order. Fed. R. Civ. P. 16 provides pertinently:

> ". . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice . . ."

The Pre-Trial Order, dated January 12, 1966, provides that the issue is:

> "Is the point at which the accident occurred a way immediately adjoining that of the Greenes' property which would be covered under policy No. H 15-79-08 issued by plaintiff Insurance Company of North America." (Clerk's Transcript, p. 18.)

No amendment to this order was sought and the case proceeded to trial on this sole issue. No amendment or modification of the Pre-Trial Order was sought by Appellee during the course of the trial.

When a Pre-Trial Order is entered, it controls the subsequent course of the action, including the appeal. *Owen v. Schwartz,* 177 F. 2d 641 (D.C. Cir. 1949). In the absence of a request for modification or amendment to the pre-trial order before or during trial, it cannot be changed or attacked for the first time on appeal. *Fowler v. Crown-Zellerbach Corp.,* 163 F. 2d 773 (9th Cir. 1947); *Fernandez v. United States Fruit Company,* 200 F. 2d 415 (2nd Cir. 1952), cert. denied 72 S. Ct. 797, 345 U. S. 935, 97 L. Ed. 1363.

In the case at bar, the language of the pre-trial conference order was prepared by Appellee's counsel. (Clerk's Transcript, pp. 17, 18.) Both sides agreed to it and the case was tried on that basis. Estoppel should not be considered as an issue in this appeal.

B. If the Court considers estoppel to be in issue, it was not established by the record.

As first reported, the Appellant considered the accident to be minor in nature and, as such, processed medical pay claims in order to create goodwill. (RT p. 22.) When the incident was reported, the Appellant was not aware that the accident occurred away from ways immediately adjoining the insured premises. (RT pp. 20, 22, 30, 34.) Reserves for bodily injury are set up by the Appellant as a matter of course, regardless of whether there is a question of coverage or liability. (RT pp. 37, 38.)

The party relying on estoppel has the burden of showing its application by demonstrating: (1) that the party to be estopped must be apprised of the facts; (2) that he intended or reasonably expected his conduct to be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) he must have relied on the other's conduct to his detriment. *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp.,* 54 Cal. 2d 773, 8 Cal. Rptr. 448. At the time the Appellees were notified of denial of coverage, the injured person had not filed a lawsuit, nor had any service been effected on Appellees. (Clerk's Transcript, p. 2.) There has been no showing that Appellees have acted or failed to act to their detriment. Appellant's actions at all times were consistent with the processing of a claim thought to be within the terms of the subject policy.

CONCLUSION

For the reasons stated herein and in Appellant's Opening Brief, it is respectfully prayed that the decision of the District Court be reversed and judgment entered in favor of Appellant.

Dated, San Jose, California,
December 19, 1966.

Respectfully submitted,
POPELKA, GRAHAM, HANIFIN,
VAN LOUCKS & ALLARD,
By FRED J. GRAHAM,
MALCOLM A. KING,
Attorneys for Appellant.

CERTIFICATION

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and in my opinion, the foregoing brief is in conformance with those rules.

MALCOLM A. KING,
Attorney for Appellant.